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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

MARY M. ROGERS, Appellant,

vs.

HENRY H. PECK, Sheriff of Windsor County,

and

WILSON S. LOVELL, Superintendent of Vermont State Prison,
Appellees.

No. 368. October Term, 1905.

ON APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF FOR APPELLEES.

CLARKE C. FITTS,
Attorney General of Vermont.

Supreme Court of the United States.

No. 368. October Term, 1905.

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vs.

Henry H. Peck, Sheriff of Windsor County,

and

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ON APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

Not having a copy of appellant's brief before us while preparing this brief, we are only able to argue upon the complaints made in her petition for the writ. We discuss those complaints in their order. References to the record are to the printed pages.

1.

The appellant complains that the Governor's reprieve is not authorized by law, and that she is, therefore, being restrained of her liberty without due process of law, and in violation of the Constitution of the United States.

a. *Is it a Federal Question?*

The power of the Governor of Vermont to grant reprieves is under section 11 of chapter 2 of the Constitution of Vermont, as amended by article 8 of the Articles of Amendment, and as so amended is in these words, in substance:—

> "The Governor shall have power to grant pardons and remit fines in all cases whatsoever, except in treason and murder; in which he shall have power to grant reprieves, but not to pardon, until after the end of the next session of assembly."

There is no statute of the state relating to the subject. The appellant's complaint that she is being held in violation of the fourteenth amendment is in itself of no consequence. Her mere averment that she is detained in violation of the Constitution and laws of the United States, and is restrained in violation of the Constitution of the United States is merely an averment of a conclusion of law and not of fact, and is not sufficient to give the court jurisdiction.

Sawyer vs. Piper, 189 U. S. 154.
Whitten vs. Tonlinson, 160 U. S. 231.
Craemer vs. Washington, 168 U. S. 124.
Ex parte Cuddy, 131 U. S. 280.
Kohl vs. Lehlback, 160 U. S. 293.

Her petition must set forth facts to make a basis for the allegation.

Is the reprieve under which she is now held "due process of law"? It is to be assumed that she was in the first instance tried, convicted, sentenced and committed to prison to await execution all by due process of law. Being so sentenced and committed and while awaiting execution, the reprieve is granted. The granting of a reprieve, under the Constitution of Vermont, is an executive function. It is favor to the prisoner.

In re Cross, 146 U. S. 277.

But for the reprieve she would have been executed on the day fixed by the sentence. It is not and cannot be in the very nature of things a judicial proceeding. It is an incident to or part of the power of pardon,

and is so classified in the Constitution. Capital punishment is the highest form of punishment known to law. Anything which delays or postpones such punishment is favor to the prisoner. To determine whether the granting of the reprieve is "due process of law," it is not for this court to inquire to what extent the Governor of Vermont has the power to reprieve, or what is the proper way for him to exercise it, or what is the proper form of the warrant of reprieve. Those are all questions for the state court alone to determine.

> "The Federal Constitution neither grants nor forbids to the governor of a state the right to stay the execution of a sentence." (Mr. Justice Brewer in Storti vs. Mass., 183 U. S. 141.)

The appellant complains that the reprieves were granted without her request or knowledge. Whether that is true or not is of no consequence; being a favor to her she cannot complain; but there is not in the Constitution nor in the statute any provision for notice or hearing on the question of reprieve, and there cannot well be. The exercise of the executive power in granting a commutation, respite, or reprieve not being in any sense a judicial proceeding, notice is not a matter of right. It rests wholly within the discretion of the power granting the favor.

It was held by this court in Holmes vs. Jennison, 14 Peters 598, that the legality of process issued by the Governor of Vermont, under the Constitution of Vermont, was for the state court alone to pass upon.

(See next to last paragraph of opinion of Mr. Justice Catron.)

The opinion of this court in Storti vs. Massachusetts, *Supra*, fully settles this question. In the case at bar, as in the Storti case, it is not stated wherein the reprieve is unlawful. From all the record shows, it is due process of law. The appellant, having been granted these reprieves, with the purpose, as is apparent, to enable her to test all her legal rights in the courts, now attacks the very power that granted her so great a favor.

In Lambert vs. Barrett, 159 U. S. 663, this court held that the question whether there was authority to issue a reprieve or death warrant was for the state court alone to determine.

b. *If the Question of the Reprieve is a Federal Question, is the Reprieve Lawful?*

The Constitution of Vermont containing the clause above cited, relative to the granting of reprieves, was adopted in 1793. At that time and from thence until 1842 there was no limitation upon the power of the court as to the date of execution of a prisoner sentenced to suffer capital punishment. Since 1842 the law of Vermont has been substantially the same as it now is, section 2004, Vermont Statutes.

> "No person sentenced to suffer the punishment of death shall be executed previous to the first day of January next after the close of the session of the General Assembly next following said sentence."

When this section was first enacted, sessions of the General Assembly were held each year, commencing on the first Wednesday in October. By the amendments to the Constitution adopted in 1870, the sessions of the General Assembly are biennial, commencing on the first Wednesday of October in each even year. The limitation to the executive power so that the reprieve can extend only until after the end of the next session of the Assembly, is plainly to be understood; with no limit, a reprieve might in effect be made a commutation, and the Governor is not given power to commute. The constitutional provision should receive a broad and liberal interpretation. The power is vested in the executive for use in emergencies. The courts take care of the legal rights of the accused, even to the extent of granting a new trial, on petition, at any time, for good cause shown. The Legislature exercises the power to commute or diminish the punishment. It is reasonable to suppose that the framers of the Constitution vested this authority in the Governor to use in just such cases as the one at bar, where it has been used, as is apparent, to give the appellant time to present her claims and test her rights before the courts. And the exercise of this power with that view requires only that the reprieves shall be for such length of time only, as in this case, as are necessary to give to the prisoner the time required to so test her legal rights.

She complains that she has had no hearing on the date to which the

reprieve should extend. She is not entitled to it, as it is not a judicial proceeding. The authority of the Governor to fix a certain date for the execution to take place is an incident to the power to grant reprieves.

State of New Jersey vs. Heller, 63 N. J. Law 105. (57 L. R. A. 312.)

The reprieve is not a new sentence, and the execution under it is not by way of a new sentence, but by reason of the expiration of a temporary suspension of the original sentence.

Ex parte Fleming, 60 Miss. 910.

There are no decisions of the courts of Vermont upon this question. If it be proper to refer to it, it may be said that long continued practice of the executive department of the state government has established this course of procedure. It was last exercised, we believe, by Governor Proctor, in the case of Phair in 1879, and the executive records show numerous instances of reprieves for a short length of time to expire sooner than the end of the next session of Assembly.

2.

No Stay of Execution Necessary on the Petition for New Trial to the State Supreme Court.

The appellant complains that the two judges of the Supreme Court of Vermont, who allowed her to file her petition for new trial to that court, erred in not making an order staying the execution of sentence until after the time fixed for hearing the petition in the Supreme Court. Vermont Statutes, section 1997, reads:—

> "When a prisoner is convicted of a capital offence and sentenced to be hung, he may bring petition for new trial at any time before execution," etc.

Section 1998 provides:—

> "Said petition shall be presented to two judges of the Supreme Court, who, upon examination thereof, shall determine whether it shall be filed and shall certify their determination

thereon; and if the petition is allowed to be filed, the judges shall make an order staying execution of sentence until after the time fixed for hearing the petition by the Supreme Court."

The appellant presented her petition to the two judges, Chief Judge Rowell and Judge Munson, on May 5, 1905. The then next term of the Supreme Court was to convene the second Tuesday of May, 1905. The appellant had been on February 1, 1905, reprieved by the Governor until June 2, 1905. There was no necessity for a stay of execution. And the Honorable Judges, in passing upon the allowance of the petition and certifying their determination thereon, expressly stated in their order the reason why they did not order a stay of execution. (See page 25 of record.)

It is apparent that the judges construed the word *shall* in the statute to mean *shall if necessary*, and that there was no necessity, and accordingly ordered no stay. Does the appellant claim that this is not due process of law? Upon whom devolved the duty of construing the statute, unless upon the two judges to whom she chose to bring her petition? We contend there is no reason for any other construction than the one those judges placed upon the statute. There is no reason for a stay except that the date of execution may be beyond the time fixed for hearing the petition. The appellant might have brought her petition a year before she did. In that case there would have been intervening three terms of the Supreme Court and a session of the Legislature before the date fixed for her execution. It would have been absurd for a stay of execution to have been granted then. The two judges acting upon her petition evidently understood that in the due course of procedure it would be heard and determined before the expiration of the reprieve. The record shows that it was so heard and determined. The cause was disposed of at the May term and the term ended May 31. (Pages 23 and 25.)

But all this is a question of procedure in the state court. In

Baldwin vs. Kansas, 129 U. S. 52,

in which case one of the errors assigned was that the jury were not sworn according to the form of oath prescribed by the statute of Kansas,

and that therefore the jury was not a legally constituted tribunal, and so that the defendant, under the judgment of the court, would be deprived of his life without due process of law, etc., this court said that the

> "Question whether the constitution of the State of Kansas was complied with or not in the proceedings on the trial, which are challenged, are not federal questions which this court can review."

And in

Lambert vs. Barrett, *Supra.*

the construction of the statute of the criminal procedure in the State of New Jersey, with reference to the constitution of the state, was before the court, and the appellant contended that the process under which he was being held, to wit, a death warrant, issued by the governor, was illegal, and that the appellant must be brought before the trial court and a new date fixed for the execution. This court held that all those were matters for the determination of the state courts, and the state court having passed upon the same adversely to the petitioner, the result involved no denial of due process of law or infraction of any provision of the Constitution of the United States.

> "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied." (Mr. Chief Justice Fuller in Leeper vs. Texas, 139 U. S. 462. Note also Hurtado vs. California, 110 U. S. 516.)

3.

FAILURE OF THE STATE SUPREME COURT TO APPOINT A TIME FOR EXECUTING THE SENTENCE.

All this is a matter of state procedure, as is settled by the cases already cited.

Lambert vs. Barrett, *Supra.*
Brown vs. New Jersey, 175 U. S. 174.
Baldwin vs. Kansas, 129 U. S. 57.

The statute under which the appellant makes this claim is Vermont Statutes, section 1999, which reads:—

> "When the trial upon petition does not take place until after the time appointed for execution, if a new trial is refused, the court hearing the petition shall appoint a time for executing the sentence and issue its order to the sheriff for that purpose."

It appears on the face of it that this law is not applicable to the petition of the appellant. The situation which must obtain before this statute can be invoked, never did obtain in her case. The trial upon her petition did not take place before the time appointed for execution. The time appointed for execution was the expiration of the Governor's reprieve, and that reprieve expired on June 2, 1905. Her petition had been heard and determined in the Supreme Court before that time. (See record, pages 23 and 25.) The word "appointed" does not mean the date of sentence fixed by the court in the first instance. The *appointed* date was the date upon which the event was to occur, and that was determined by the expiration of the reprieve.

A simple, commonsense construction of this statute shows that it means nothing else than that the court hearing the petition shall appoint a time for executing the sentence, *if necessary* to enable the court to properly dispose of the petition before the time of execution.

Mr. Justice White, in rendering the opinion in the case of Louisville & Nashville Railroad Company vs. Schmidt, 177 U. S. 230, said:—

> "It is no longer open to contention that the due process clause of the fourteenth amendment to the Constitution of the United States *does not control mere forms of procedure* in state courts, or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend." Citing

Ia. C. R. Co. vs. Ia., 160 U. S. 389.
Wilson vs. N. C., 169 U. S. 586.

The appellant complains in her petition that at her trial in the Bennington County Court, the principal witness against her was one Perham, and that Perham refused to submit to cross examination, and that his testimony was submitted to the jury without limitation or instruction from the court, on account of said refusal and lack of cross examination. She does not state how or wherein this is in violation of the Constitution of the United States. She says (page 3 of record) that by reason of her lack of mental capacity she did n't know or understand that it was unlawful and in derogation of her rights under the Constitution, but she does not say affirmatively that it was in derogation of her said rights. As has already been suggested, the court will not undertake to determine any other questions than those raised by the appellant in her petition. This whole matter relates only to the practice in the state court. The state has full control over procedure in its courts.

Brown vs. New Jersey, *Supra.*
Lambert vs. Barrett, *Supra.*
Baldwin vs. Kansas, *Supra.*

Any question relating to procedure in the state court cannot be raised by *habeas corpus.* A writ of error is the proper remedy to review judgments and practice of state courts.

In re Frederick, 149 U. S. 70-78.
Markinson vs. Boucher, 175 U. S. 184.
In re Schneider, 148 U. S. 162.
In re Duncan, 139 U. S. 479.

The record of the trial court is not here. The appellant has not seen fit to have it brought here. It may be proper for us, however, to examine the opinion of the Vermont Supreme Court in relation to this matter, and we call the court's attention to the case of Rogers vs. State of Vermont, 77 Vt. 454. This is the appellant's petition for new trial, referred to in the proceedings here. On page 461 the court refers to the cross examination of this witness, Perham. The full record was before this court, and, as is averred by the appellant, the opinion on this

petition for new trial was rendered by the learned judge who presided at the trial court, and this judge says in this opinion, referring to this witness:—

> "The witness was cross examined by the petitioner's counsel and in some respects made contradictory statements and some questions he did not answer, but regarding the particulars of the homicide and the part which he and the petitioner took in the same, his testimony in chief was not materially changed or shaken."

The question which the appellant undertakes to raise in this regard is absolutely frivolous.

5.

The appellant complains that her rights under the Constitution of the United States have been infringed because she has "been denied the right of appeal for a correction of errors of the trial court." She says there is no Supreme Court of the State of Vermont to which she has the right to appeal for a correction of the errors which she alleges occurred on her trial in County Court. This question as the appellant makes it, raises only the question of the Constitution of the State of Vermont, and the alleged collision of the state statute with the state constitution. It is not a federal question. The cases above cited are full authority on this point.

Baldwin vs. Kansas, *Supra.*
Brown vs. New Jersey, *Supra.*
Lambert vs. Barrett, *Supra.*
Porter vs. Foley, 24 How. 415.
Tuttle vs. R. R. Co., 168 U. S. 131.

But the point is not well taken in fact. The Constitution of the State of Vermont nowhere requires that a *Supreme Court* be maintained *in* each county. It refers to and provides for the election of judges of the Supreme Court. The only requirement in the present Constitution of Vermont (adopted in 1793) as to courts of justice in

each county is in section 4, chapter 2, which says, "Courts of justice shall be maintained in every county in this state," etc. This section was in substance embodied in the first constitution, adopted in 1777, and has always remained a part of the organic law of the commonwealth. For a time after the Constitution of 1777 was adopted, or until 1782, there was no Supreme Court. The Legislature of 1782 first established that tribunal. Act of June 21, 1782, section 7.

A Supreme Court Constituted.

> "And be it further enacted by the Authority aforesaid, That there shall be and hereby is constituted, a Supreme Court of Judicature within and for this State, to be held and kept annually, at the respective times and places in this Act hereafter mentioned, by one chief Judge and four other Judges, to be chosen by ballot, by the Governor, Council and General Assembly, annually, at their October Session, and commissioned for that purpose; any three of whom to be a quorum; who shall have cognizance of all pleas of the State, criminal actions and causes, and whatsoever relates to the conservation of the peace, and punishment of offenders, whether the same be brought into said court by appeal or any original process according to law."

The court so established, finally determined all questions as they arose on trial, the court sitting for trial of jury causes and having general jurisdiction and final determination of questions of law and effect. This judicial system obtained until 1797. By section 6 of Act No. 1 of the Acts of 1797, there was constituted a

> "Supreme Court of Judicature within and for the state to be holden at the respective times and *places* by law appointed for that purpose."

By section 1 of the same act there was constituted a County Court to be holden in each of the several counties of the state. The Supreme Court of Judicature, as provided in said section 6, had

"original and exclusive jurisdiction of all crimes and misdemeanors where the punishment extends by law to the loss of life, limb, or to disfranchisement."

The statute now in force, making death by hanging the punishment for murder in the first degree, has been the law of Vermont since 1787. So by this Act of 1797 the Supreme Court of Judicature had original and exclusive jurisdiction of this crime. The structure of the judicial system has been frequently changed by the Legislature.

Jurisdiction of the crime of murder was first given to the county courts by chapter 19 of the Public Acts of 1824, section 5 of which reads:—

"The several County Courts in their respective counties shall have original jurisdiction of all criminal matters of every name and nature arising within such counties, and award sentence on same."

Section 1 of the same Act reforms the structure of the Supreme Court of Judicature, and section 12 of the Act provides for taking all questions of law from the county court to the Supreme Court of Judicature by appeal.

Section 12:—

"All questions of law arising upon jury trials . . . . may pass to the Supreme Court for final decision."

Section 14 reads:—

"In all trials for capital offences there shall be present at least two judges of the Supreme Court to sit as judges upon such trial."

Act No. 40, of 1849, established a Supreme Court and Circuit Court. By said Act of 1849, causes arising in any county of the circuit might be heard in any other county of the circuit, if the Supreme Court so ordered. For section 7 of said Act of 1849 provides:

"That in addition to the sessions of the Supreme Court, now ordered by law, there shall be annually one session of said court in each judicial circuit."

And section 8:—

> "The Supreme Court at circuit sessions shall hear, try, and determine the business which may have been left unfinished at the preceding term of said court, in *each county* in said circuit."

The system established by the Act of 1849 continued until the passage of Act No. 1, of Acts of 1857, which abolished the Circuit Courts and provided for the Supreme Court and county court in each county. This remained the law until 1892, when the present judicial system was established. The law now is (section 994, Vermont Statutes):—

> "Three general terms of the Supreme Court for all counties shall be held as follows: On the second Tuesday in January, May, and October, of each year, at Montpelier, and special terms may be there held at such other time as the judges appoint. All causes on the docket of the court in the several counties shall be heard at such terms."

By section 993, Vermont Statutes:—

> "The Supreme Court has exclusive jurisdiction of writs of error to courts of inferior jurisdiction that may be necessary to the furtherance of justice and regular execution of the laws; and may try and determine questions of law removed from the county court, pursuant to law."

Vermont Statutes, section 1010:—

> "Each County Court shall have original jurisdiction in prosecutions for criminal offences within their respective counties . . . . and may award sentence according to law."

It will be seen from the foregoing that the structure and jurisdiction of the courts has been subject to legislative control all the time, and in the century and a quarter of the life of the commonwealth the power of the Legislature so to act has not been questioned.

Long ago the Legislature compelled residents of one county to go to another county to Supreme Court.

Act of November 4, 1800, section 1:—

> "The Supreme Court of Judicature shall not perform its circuit in the County of Essex until the same shall be directed by future act of the Legislature, but all causes proper to come before said court shall be entered, tried, and determined at their session at Danville, in the County of Caledonia."

The present statute has been passed upon by the Supreme Court of Vermont.

In Tucker vs. Eden & Lowell, 68 Vt. 168, a petition for laying of a highway in two towns situated in two counties, Lamoille and Orleans, was before the court upon a motion to dismiss. The petition was addressed to the "Supreme Court to be held at Montpelier, in the County of Washington, at its general term, May, 1896." The grounds for the motion to dismiss were: First, that the citation should have been signed by the clerk of the general term of the Supreme Court; second, that the petition should have been addressed to the Supreme Court for Lamoille County. The court held, Chief Judge Ross delivering the opinion, that the three general terms of Supreme Court were terms of the Supreme Courts for each of the counties.

> "They are not courts for the state as a single municipal corporation, but are general terms at which are held the Supreme Courts for the several counties which are included in the state. It is manifest from the language of the section, Vermont Statutes, 994 . . . . inasmuch as the Supreme Court in general term is the Supreme Court for the County of Lamoille, as well as for the other counties, ... the address in the petition and citation . . . . the latter being signed by the clerk of the Supreme Court for the County of Lamoille . . . . is for the Supreme Court of that county."

By section 1961 of Vermont Statutes:—

> "Questions of law decided by the county court, arising upon demurrer, trial by jury or motion in arrest, in a prosecution by indictment or information for a crime or misdemeanor,

shall, if verdict of guilty is returned, upon motion of the respondent, be allowed and placed upon the record; and the same shall thereupon pass to the Supreme Court for final decision. And judgment, sentence, and execution shall be respited and stayed in capital cases, and in other cases only at the discretion of the court."

If the Bennington County Court erred in any of its proceedings in the trial of the appellant, she had a right to exception, the right to take her case to the Supreme Court, which is established under the Constitution and laws of the State of Vermont for that purpose. By her petition for new trial she recognized the Supreme Court sitting in general term as the Supreme Court for Bennington County. The jurisdiction of the court is no stronger in case of a petition for new trial than in case of exceptions from the county court.

Baldwin vs. Kansas, *Supra.*
Lambert vs. Barrett, *Supra.*

The appellant complains that in Bennington County she has not the same right of appeal that the law secures to residents of Washington County in which is located the state capital, where the Supreme Court sits in general term. This is not true, since the Supreme Court is "for all the counties," as has appeared. But if it were so, it would not be a denial of the "equal justice" guaranteed by the fourteenth amendment. A state may provide one judicial system for one county and another for an adjoining county, so long as it does not abridge the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same county.

Missouri vs. Lewis, 101 U. S. 33.

It is not claimed that the appellant had anything less than all the protections afforded to citizens of Bennington County.

But if there is no Supreme Court for Bennington County, then Bennington County Court is the highest court in the State of Vermont in which the appellant's case could have been tried and determined.

Therefore, a writ of error might have issued from this court to the Bennington County Court. A writ of error issues from this court or from a judge thereof to the highest court of a state in which a determination of the case can be had. (Rev. Stats., section 709.)

In

Bergerman vs. Backer, 157 U. S. 655,

Mr. Justice Harlan said:—

> "If the proceedings in the court of oyer and terminer could not under the laws of New Jersey be reviewed in a higher court of that state, except upon the allowance of a writ of error by said court, or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the Acts of Congress, the judgment of the highest court of the state in which a determination of the case could be had. Such judgment could be had upon writ of error to be examined here, if it had denied any right or immunity specially set up and claimed under the Constitution of the United States."

Note also:—

Gregory vs. McVeigh, 22 Wall 294.
Fisher vs. Perkins, 122 U. S. 522.
Dunham vs. Alexandria, 9 Wall 659.
Miller vs. Joseph, 17 Wall 655.

The appellant complains that the Judge of the Supreme Court who presided at the trial in county court could not legally sit in the Supreme Court on the petition for a new trial.

The only statute relating to disqualification of a judge on account of having presided in the county court is section 1001, Vermont Statutes.

> "No judge shall sit at the trial of a cause in banc which he tried in the county court."

The cause tried in Bennington County Court was not the cause on trial in the Supreme Court. It was no ruling of Judge Watson that was before the Supreme Court to be passed upon. Therefore, it was

not only legal but entirely proper and right that he should sit on the petition for the new trial, for his familiarity with the trial in the court below naturally made him better able to understand the force of what was urged in behalf of the petitioner.

Is the Manner of Appellant's Confinement a Federal Question or Before This Court?

The appellant in her petition for this writ does not complain of the manner of her confinement. She complains that she is "held and detained" without due process of law; that she is "restrained of her liberty" in violation of the fourteenth amendment, but she nowhere alleges that she is in solitary confinement or has any time been so confined. As the record shows, the learned judge in the court below seems to have been somewhat troubled about this question of confinement, and in his opinion comments at length upon Medley's case, 134 U. S., and intimates that the reason for issuing the writ was the doubt which he entertained upon the question of solitary confinement. (See record, page 21.)

It is not the duty of this court to consider questions not raised by the appellant in her petition for a writ. The statute requires her to fully set forth the facts concerning her detention.

Revised Statutes, U. S., section 754.

It is not the duty of this court to go hunting for trouble nor to consider matters which appear in the record as mere surplusage or collateral to the questions raised by the petition. The reason for this is too apparent to need argument and the precedents too numerous to need citation.

In this connection it is well to consider the discussion of the principles governing the action of this court as stated in *ex parte Royall*, 117 U. S. 241, and in

Kohl vs. Lehlback, 160 U. S. 296.
Craemer vs. Washington State, 168 U. S. 124.

Section 2007, Vermont Statutes, which has been the law since 1878, provides:—

> "When execution is not to take place until after six months from date of sentence, the court at the same time shall sentence the respondent to hard labor in the state prison or house of correction until three months before the time fixed in the sentence of death for execution thereof, and shall also sentence him to solitary confinement in the state prison or house of correction from the expiration of the sentence to hard labor until the time of execution."

There is no definition of the term "solitary confinement" in the Vermont law, or in the decisions of the Vermont courts. The mittimus attached to the return of Appellee Lovell (page 15 of record) shows that the sentence imposed by the Bennington County Court upon the appellant is in conformity to the foregoing provision of the Vermont law.

The decision of this court in Medley's case, 134 U. S. 160, simply held that a statute passed after the commission of the crime of murder, which added to the punishment of death (that being the punishment when the crime was committed) the further punishment of imprisonment in solitary confinement until the execution, was, when attempted to be enforced against a convict so situated, an *ex post facto* law, and that the sentence inflicting both punishments was void. This case is fully discussed and distinguished in

McElvaine vs. Brush, 142 U. S. 155.

In the latter case it was contended that the solitary confinement provided for in the New York code constituted cruel and unjust punishment. But this court held that it should follow the adjudication of the highest court of a state in the construction of its own statutes.

There is no question of an *ex post facto* law in this case; the statute was in force long before the crime in question was committed.

The Governor's reprieves made no order and no regulation as to the manner of the appellant's confinement. There is no constitutional nor statutory provision for any such order or regulation in or as a part of

or incident to a reprieve by the Governor. The sentence was suspended. She was left where she was. No additional punishment was inflicted upon her. She can certainly have no more rights than in case of a sentence vacated and second sentence imposed. In such a case the infliction of solitary confinement by the second sentence has been held not to be in itself a distinct and separate punishment. It is made necessary by reason of the due and lawful proceedings in the case. This question is fully discussed by this court in

Murphy vs. Massachusetts, 177 U. S. 155,

to the effect that the additional solitary confinement made necessary by the second sentence, making in all a term of solitary confinement in excess of the statutory limit, is not in violation of the Constitution of the United States.

The Governor in his warrant of reprieve made no order or regulation as to the manner of appellant's confinement. Neither the Constitution nor the Statute of Vermont make any regulation in such a case. If then, the superintendent of the prison, in whose custody she was, held her in solitary confinement pending the reprieve, and if that solitary confinement was unlawful, that restraint was not an act of law, but the illegal act of the superintendent of the prison. The appellant's rights in the premises, therefore, would be against the superintendent. This court has nothing to do with the wrongs which may have been inflicted by an individual upon the appellant. It is only to inquire into what the *state* has done.

Murphy vs. Mass., *Supra.*
People vs. Trezza, 128 N. Y. 536.

The return of the Appellee Lovell, the superintendent of the prison, is a bit ambiguous, and in some particulars contradictory. It seems an amendment was added after his return was completed. (Pages 14 and 15, record.)

It appears from this return that the superintendent has held office only since April 1, 1905, and knows only from hearsay about the manner of the appellant's confinement before that day. Therefore, there is nothing properly before this court to show the manner of

confinement before April 1, 1905. The opinion of the learned judge of the district court hardly goes beyond this return.

In substance the return shows this: She has been kept in a room twelve feet square, with two outside windows, one with a view of quite a portion of State Street, in the Village of Windsor; has been visited by the matron of the prison a number of times a day, and on frequent occasions the matron has remained in the room visiting with the prisoner from a few minutes to as much as an hour at a time, and that the assistant to the matron has also frequently visited and conversed with the prisoner on an average of two or three times a day. That she has been visited by priest or chaplain at least once a week, by officers of the prison and county, and has had literature, magazines and periodicals, and occasionally a newspaper; and after June 10 all the time a female person as guard has been with her. And the superintendent in his return states that he understands such confinement to be solitary confinement according to the Statute of Vermont, and according to the rules and usages of the state prison.

This confinement is mild indeed compared to that in question in Medley's case. It ought not to be regarded as anything more severe than is required for the proper safeguarding of a prisoner under sentence of death with the date of the execution near at hand.

Is the Last Reprieve Legal?

The record shows (page 23) that in the court below, after writ was dismissed, and the appellant remanded to her former custody, and before an appeal was allowed and perfected, the Governor granted the reprieve, which expires December 8, 1905. The Revised Statutes, section 766, amended, 27 U. S. Stats. 751, makes null and void any proceeding against the prisoner in any state court or by or under the authority of any state pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein. The three "preceding sections" include Revised Statutes, section 763, the provision for an appeal from the final decision of any court inferior to the Circuit Court upon a writ of habeas corpus

issued in the case of any prisoner alleged to be restrained in violation of the Constitution of the United States. By an amendment to the statute (Sup. to R. S. of U. S., Chap. 517, Act of March 3, 1891, Sec. 5), appeal may be had from a district court direct to this court. Revised Statutes, section 765, provides that an appeal shall be taken on such terms and under such regulations and orders as may be prescribed by the Supreme Court. Rule 36 of this court prescribes the method for taking an appeal, and under that rule and the statute, the allowance of an appeal by the Circuit Court, the District Court or by some judge thereof, or of the Supreme Court, is necessary to the perfection of the appeal. And if an order of allowance is denied by the court, the party desiring to appeal must apply either to some of the other judges named, for the allowance, or to the Supreme Court for a writ of mandamus in aid of its appellate jurisdiction.

In re Durrant 84 Fed. Rep. 317.

The language of the statute, section 766 makes a distinction between the original proceeding and the appeal. It says, "Pending the proceedings *or* appeal." There was final judgment in the original proceeding when the court dismissed the writ and remanded the appellant to her former custody. Thereupon she was in the hands of the officers of the state and subject to full control of the state and its laws and proceedings. No "proceeding" was then "pending." Thereafterward there was nothing to stay the hand or the authority of the state until the appeal was allowed. A prayer for an appeal is not a proceeding pending within the meaning of the statute. It is the "pendency of the appeal" which stays the state authority. It is uniformly held that an allowance of an appeal is necessary to make it an appeal within the meaning of the statute.

Barrell vs. Transportation Co., 3 Wall 424.
Gleason vs. Florida, 9 Wall 779.
Railway Co. vs. Gude, 141 U. S. 244.

But this reprieve was not granted in defiance of the Federal Court or its authority. The purpose is apparent, and is as expressed by the learned judge of the court below in the final paragraph of his decision. (Page 23.)

It was granted to give the appellant sufficient time to have her appeal heard and disposed of in this court. It was the apparent purpose of the Governor to suspend the sentence by the reprieve for a time long enough so that no stay by the Federal Court would be necessary. It is in harmony with the proceedings in the Federal Courts, and its effect is simply to expedite the administration of justice in Vermont. Under section 2004 of Vermont Statutes, no sentence of death can be imposed to take effect until after the first day of January, 1907, for by that statute the date of execution must be fixed not earlier than the first day of January following the next session of the General Assembly. The next General Assembly meets in October, 1906. It is apparent that if a stay had been granted by the court below it would have made necessary the re-sentencing of the appellant, and consequently a long delay in carrying out the penalty imposed by the law for the crime of which the appellant stands convicted.

Habeas Corpus not Proper Remedy.

The appellant raised no question on the Federal Constitution in her trial in the county court. She made no motion in the State Supreme Court for a stay of execution nor to be re-sentenced. She has not sought relief in the state court for the alleged wrong she claims to be suffering, by being held under the Governor's reprieve. She should have first gone there for protection.

This court has repeatedly frowned upon attempts to use the writ of habeas corpus in place of a writ of error.

Chief Justice Fuller, delivering the opinion of this court *in re* Swan, 150 U. S. 637, said:—

> "The writ of habeas corpus cannot be used to perform the office of a writ of error or appeal."

Under the writ of habeas corpus, the court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact and pronounce them erroneous.

In re Frederich, 149 U. S. 70-78.
Ex parte Siebold, 100 U. S. 371.
Ex parte Curtis, 106 U. S. 371.
Ex parte Yarbrough, 110 U. S. 651.
Ex parte Wilson, 114 U. S. 417.
Ex parte Royall 117 U. S. 241.
Stevens vs. Fuller, 136 U. S. 468.

Where the validity of a sentence of a state court can be tested by the Supreme Court of the state or a writ of error from this court applied for, the United States District Court should not sustain a writ of habeas corpus to discharge the person convicted.

Pepke vs. Cronan, 155 U. S. 100, 101.

In rendering the opinion in this case, Mr. Chief Justice Fuller said:—

"It is insisted upon the argument that the judgment in contempt was not appealable (State vs. Davis, 2 N. D. 461), but it was conceded that the validity of the law and of the sentence could be tested by the Supreme Court of the state on certiorari or habeas corpus, and no reason was suggested why, if the judgment of the District Court was final judgment of the highest court of the state in which a decision of the matter could be had, a writ of error from this court might not be applied for.

"Without considering the merits of the questions discussed, the judgment must be affirmed upon the authority of

Ex parte Fonda, 117 U. S. 516.
Wood vs. Brush, 140 U. S. 278.
Cook vs. Hart, 146 U. S. 183.
New York vs. Eno, 155 U. S. 89, 90."

"The interference of the Federal Court is not demanded, particularly where the state court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. The state courts are as much bound as the Federal

Courts to see that no man is punished in violation of the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the state than by an interference which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there."

Davis vs. Burke, 179 U. S. 399.
Minnesota vs. Brundage, 180 U. S. 499, 505.

No Federal Question Raised.

We contend that there is not the semblance of an infringement of the appellant's rights under the Federal Constitution shown by any of the proceedings in her case. She has been subject simply and only to "due process of law" in the State of Vermont. The state has protected her by its constitution and its laws. It has granted her "equal rights" with all the other citizens of the commonwealth. Every opportunity has been afforded her to raise in the state courts all the questions she saw fit. She stands convicted and awaits execution because a jury of her peers have found her guilty and the laws of Vermont make her crime punishable by death.

The interference of the Federal authority in this case would, in effect, take from the State of Vermont the power to enforce its laws and protect its citizens. Broadly stated, if it is the duty of this court to grant the writ the appellant prays for, then it is its duty to put its hand upon all state procedure and to inquire minutely as to each and every step. It would reduce state authority to that of a mere minor civil division. The fourteenth amendment does not and never did mean anything of the kind.

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For the Appellees.